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SUPREME COURT, U.S.

No. 98-439

In The

Supreme Court of the United States

October Term, 1998

MARA KIRSH and JOSEPH KIRSH,

Petitioners,

vs.

THE CITY OF NEW YORK, THE COMMISSIONER OF THE DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK, DAVID BRADLEY MANAGEMENT CO., DAVID WEISS, DEBBIE LEUNG, JOHN WELLS, SHEILA SAMMS, JANE AND JOHN DOE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS DAVID BRADLEY MANAGEMENT CO. AND DAVID WEISS

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COUNTER QUESTION PRESENTED

Should this Court exercise its discretion to review an express factual finding by the court below that Respondents are private citizens not acting under color of law when the proper rule of law was applied and the decision is not in conflict with other circuits?

STATEMENT PURSUANT TO RULE 29.6

Respondent, David Bradley Management Co., has no parent companies and no nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

The Petition of Mara and Joseph Kirsh (collectively, the "Petitioner") for a Writ of Certiorari requests a review of the Second Circuit's unpublished Summary Order affirming the Judgment of the District Court in its entirety. The District Court's opinions were based upon the extensive and undisputed evidence demonstrating that the Respondents David Bradley Management Company (David Bradley) and David Weiss (collectively, "the Respondents") were not state or city employees or acting in concert with the state or the city, and as such were not state actors. The District Court also found that David Weiss' appointment as a 7A Administrator did not make him a state actor.

Based upon the record, the District Court granted the Respondents' motion for summary judgment dismissing the complaint against the Respondents as well as the other 7A Administrators. The Court of Appeals for the Second Circuit carefully considered all of the appellants' arguments on appeal and reached the same conclusion as the District Court. The Second Circuit affirmed the District Court's findings in the Summary Order:

> We affirm the judgment of the District Court in its entirety substantially for the reasons in its opinions stated below.

(Citations omitted) (App-2).[1]

In his petition to this Court, the Petitioner does not raise a single important question of law warranting review. The

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1. Citations in the form "App-" refer to pages of the Appendix to the Petition.

Petitioner has made a conclusory claim that the Second Circuit decision conflicts with other circuits on the question of whether mere court appointment creates state action for purposes of § 1983 liability. As demonstrated below, there is no compelling reason for this Court to review this meritless argument.

A. Petitioner Has Omitted Several Material Facts Which Support The Courts' Findings That The Respondents Are Not State Actors.

Given the District Court's factual findings, the Petitioner's failure to discuss material facts concerning Respondents David Weiss and David Bradley in his Petition, is conspicuous by its absence. The omitted facts formed the basis for the District Court's findings that: (1) Respondents did not act in concert with the city or the state; and (2) mere court appointment of a 7A Administrator does not create state action. The omitted facts are as follows:

David Weiss, a private citizen with real estate experience, was appointed a 7A Administrator as a result of a Stipulation dated August 14, 1992, "so ordered" by the Honorable Gerald R. Klein, Judge of the Civil Court of the City of New York, Housing Part. Under the Stipulation, the Petitioner expressly consented to the appointment of David Weiss as an Administrator. (A-1010).[2]

In his capacity as 7A Administrator, David Weiss retained David Bradley of which he was a principal, as managing agent of the building located at 239 Elizabeth Street, New York, New York. (A-433). David Bradley operated, managed and repaired the premises on behalf of the tenants. (A-433, 581). David

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2. Citations in the form "A-" refer to pages of the Appendix submitted to the Second Circuit.

Bradley collected rent from the tenants of the building, applied the rents to the repair and maintenance of the buildings and corrected the conditions that were dangerous to the tenants. (A-434). Compensation for managing the building came from the rental proceeds of the building. No funding was provided by the government. (App. D-12).

In September 1993, David Bradley learned from John McGrinder, an independent contractor on the site, that the New York City Fire Department had conducted an inspection and found fire code violations. (A-434). In a Violation Order dated September 14, 1993, the Fire Department required that David Bradley remove all motorcycles and inflammable liquids and rubbish forthwith, remove all accumulations of inflammable rubbish from the storefront/basement and maintain all parts of the premises free from such accumulations at all times. (A-1021). David Bradley authorized McGrinder to correct the conditions found to be in violation in order to comply with the Fire Department's Violation Order. (A-434). McGrinder hired Jerry Basciano to respond to the Fire Department's Violation Order. (*Id.*).

Based on these facts, the District Court found that the 7A Administrator retained a fiduciary obligation to the building and tenants thereof, and managed the building independently, choosing tenants and contractors without approval from the City Department of Housing Preservation and Development ("HPD"). (App. D-6, 7-12). The District Court further found that the 7A Administrator acted on behalf of the tenants (App. D-6, 12), and concluded that Respondents could not be state actors.

B. Petitioner Has Misstated The History Of The Case.

1.

Petitioner misrepresents the basis for his federal court action. Petitioner claims that relief was sought in federal court rather than state court because the 7A statute immunized the city from liability. (Pet.-5). There is no support anywhere in the record for this statement. Petitioner, as found by the District Court, had more than adequate State remedies which the Petitioner repeatedly ignored. In fact, in two other instances, Petitioner attempted to remove the state 7A proceeding to Federal Court only to have Judge Ward remand it on both occasions. (A-49).

2.

Petitioner now claims that the basis for liability against Weiss, is due to his appointment as a 7A Administrator. Petitioner's original theory, as alleged in his Summons and Complaint, was that Respondents acted as agents of the City and under the supervision of the Commissioner of HPD. (App. F-2). Furthermore, Petitioner claimed that Sheila Samms, one of the City defendants, acted in concert with Weiss. (App. F-2). Petitioner changed the theory when discovery unequivocally demonstrated that Samms and Weiss were not acting in concert.

3.

There is no proof to demonstrate that Weiss disposed of the Petitioner's personal property. Instead, the proof demonstrates that an independent contractor retained by David Bradley responded to a New York City Fire Department Violation Order which required that all debris and rubbish be

removed. Petitioner has not adduced any proof that any rubbish and inflammable material removed was the Petitioner's. Furthermore, Petitioner has not demonstrated that property allegedly present in the building at the time he was barred from entry, was the rubbish removed over four years later by any contractors retained by David Bradley.

4.

Petitioner mischaracterizes the significance of the Second Circuit's unpublished opinion. The opinion was issued under Court of Appeals Rule § 0.23 providing that a Summary Order may be issued in those cases, (like this one), in which the decision is unanimous and each Judge of the panel believes no jurisdictional purpose would be served by a written opinion. Thus, it seems clear that the Second Circuit did not view its Order as conflicting with any other circuit.

REASONS FOR DENYING THE WRIT

Supreme Court Rule 10 provides that a writ of certiorari will be granted only for compelling reasons. Petitioner has failed to identify any significant and compelling legal issues raised by the decisions of the lower courts which merit this Court's attention. The District Court's decisions below (and the Second Circuit's affirmance) were based upon the facts of the case and were not a declaration of a new rule of law conflicting with the decisions of this Court or any other circuits.

The Court should follow its long standing holding that it will not grant certiorari when the review sought turns solely upon analysis of particular facts of the case rather than some clear or overriding legal controversy, *see Texas v. Meade*, 465 U.S. 1041, 1043 (1994), and deny the writ.

I.

THE PETITION MUST BE DENIED BECAUSE THE DECISIONS BELOW ARE NOT IN CONFLICT WITH ANY OTHER CIRCUIT.

The Petitioner's claim that there is a conflict in the circuits concerning § 1983 liability for persons appointed by a court is without merit. The Second Circuit's Summary Order affirming the District Court's order granting summary judgment in this case does not conflict with another United States Court of Appeals decision. Moreover, Petitioner did not demonstrate any other basis for concluding, as required by Sup. Ct. R. 10(a), that this is an important matter that requires the Court's consideration.

The District Court's decisions (and the Second Circuit's affirmance) involved a detailed and thorough review of the extensive evidence presented in the case and the application of well-established legal principles to the factual record. The lower court's lengthy opinions correctly analyzed the specific factual circumstances arising out of the appointment, on consent, of this 7A Administrator. After careful consideration, the Court found that the facts demonstrated that this 7A Administrator was not an employee of the City or the State; that this 7A Administrator neither acted in concert nor conspired with any employee of Housing Preservation; and that this 7A Administrator was akin to a fiduciary, acting in the best interests of the tenants. As such, the Court correctly found that, under the facts of this case, this 7A Administrator could not be liable under 42 U.S.C. § 1983.

The Petitioner contends that there is a conflict and inconsistency among the circuits with respect to whether court-appointed individuals act under color of state law. Not only is the issue presented by Petitioner overbroad, there is no such

conflict. The Petitioner has identified nothing more than the mere legal truism that the determination of whether an individual is acting under color of state law turns on the particular facts of the case. This Court has recognized that different factual circumstances may lead to different conclusions concerning individuals acting under color of state law. In *Polk v. Dodson*, 454 U.S. 312 (1981) this Court found that a court-appointed public defender did not act under color of the law when performing a lawyer's traditional function as counsel to a defendant in a criminal proceeding. However, the Court did not rule out a finding that under different factual circumstances such an attorney could be acting under color of law.

Petitioner has also failed to alert the Court that resolution of any alleged conflict does not end the inquiry. (App. D-13). As noted by the District Court, allowing plaintiffs to pursue a civil rights claim against the defendants could erode the immunity proffered to administrators under New York Real Property Actions and Proceedings Law Section 778. Moreover, it is well established that a court-appointed administrator is similarly cloaked with a Judge's immunity. *See Bradford Audio Corp. v. Pious*, 392 F.2d 67 (2nd Cir. 1968); *Kermit Construction Corp. v. Banco Credito*, 547 F.2d 1 (1st Cir. 1976). Thus, even assuming *arguendo* Petitioner's contentions to be true, the respondents are immune from suit. (*See* App. D-13).

There is also no cause for this Court to reach the Petitioner's unsupportable arguments since the District Court correctly found that the Petitioner's adequate and available state remedies precluded any finding that Petitioner's due process rights were violated. To substantiate a claim under § 1983, Petitioner must not only allege a state actor committed the conduct complained of, but also that the conduct deprived him of his constitutional rights. *See Parratt v. Taylor*, 451 U.S. 527 (1979). If the state

provides an adequate post-deprivation remedy, a state actor's deprivation of plaintiff's property does not result in a violation. *See Hudson v. Palmer*, 468 U.S. 517 (1984). A provision of adequate state post-deprivation remedies provides all the due process that is required. (*Id.*). Thus, it has been held that the civil action of conversion (the remedy sought by Petitioner) is an adequate remedy when an individual claims property was wrongfully taken. *See Tigner v. The State of New York*, 559 F. Supp. 25, 742 F.2d 1432 (2nd Cir. 1981). As such, Petitioner has failed to demonstrate an important or compelling reason to justify review by this Court.

In sum, this case does not warrant the Court's attention as the District Court's decisions (and the Second Circuit's affirmance) correctly applied the law to the extensive factual record, and is not in conflict with decisions of other circuits.

CONCLUSION

For the reasons given above, the Petition should be denied.

Respectfully submitted,

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